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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DELFINO MARQUEZ, JR.,

Defendant and Appellant.

H044921

(Monterey County

Super. Ct. No. SS170485A)

After defendant Delfino Marquez pleaded guilty to violations of the Vehicle Code, the trial court suspended imposition of sentence and placed him on probation. On appeal, he challenges the gang-related conditions imposed at the sentencing hearing. We find, however, that defendant's claim of error cannot be reviewed on appeal because it falls within the scope of the appellate waiver he agreed to in his plea agreement. We must therefore dismiss the appeal.

Background

On March 27, 2017, appellant was charged by felony complaint with evading a peace officer while driving with willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a), count 1)¹; misdemeanor driving under the influence of alcohol (§ 23152, subd. (a), count 2); misdemeanor driving with a blood alcohol content of 0.08 percent or higher (§ 23152, subd. (b); count 3); and misdemeanor driving with a suspended license for a prior conviction for driving under the influence

¹ All further statutory references are to the Vehicle Code except as otherwise indicated.

(§ 14601.2, subd. (a); count 4). Attached to count 3 were two sentence enhancements, for driving with a blood alcohol content (BAC) above 0.20 percent (§ 23556, subd. (b)(4)) and for a prior conviction for driving under the influence within 10 years (§ 23540).

Defendant initially pleaded not guilty and was released on his own recognizance (O.R.), but O.R. was revoked and he was returned to custody after he reported to probation with a 0.20/0.22 percent BAC.

On April 25, 2017, as part of a negotiated disposition, defendant pleaded guilty to counts 1 and 3, with the understanding that in lieu of a potential prison sentence of up to three years, he would receive felony probation with up to one year in jail. The plea agreement also called for defendant to waive all state and federal appeal rights. Defendant's attorney signed a statement affirming that he had explained to defendant the nature of the charges and defenses and the consequences of the plea.

At sentencing on May 30, 2017 the court considered 31 probation conditions proposed by the probation officer, including four gang-related restrictions. Those conditions restricted defendant from visiting "gang-gathering" areas; associating with gang members; possessing, wearing, using, or displaying indicia of gang affiliation; and obtaining new tattoos.² Defense counsel objected to those four conditions because "[t]he offense has nothing to do with gang activity." The court overruled the objection, noting

² The challenged conditions were numbers 23 through 26, as follows: "23. Not visit or remain in any known gang-gathering area. [()The term 'gang' in these conditions of probation refers to 'criminal street gang' as defined in [Penal Code section] 186.22). [¶] 24. Not associate with any individuals who are gang members, or who are on any form of probation, mandatory supervision, post[-]release community supervision, or parole supervision. [¶] 25. Not possess, wear, use or display any item you know, have reason to know, or have been told by the Probation Officer to be associated with membership or affiliation in a gang, including, but not limited to, any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia to include the colors red or blue. [¶] 26. Do not obtain any new tattooing upon your person while on probation supervision. You shall permit photographing of any tattoos on your person by law enforcement."

that defendant had admitted being a Norteño gang member.³ The court found the challenged conditions to be reasonable in view of defendant's "gang ties" because they related to "defendant's future criminality and ability to remain crime free." The trial court then suspended imposition of sentence and placed appellant on five years of formal probation under the 31 conditions, including the gang restrictions and service of 180 days in county jail. The remaining charges were dismissed.

Defendant originally filed a notice of appeal on August 7, 2017, stating, "This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." On October 13, 2017, over the People's opposition based on lack of appellate jurisdiction, this court granted defendant's motion for relief from default for failure to file a timely notice of appeal.

More procedural wrangling followed, however. In their respondent's brief on appeal, the People pointed out that defendant had not obtained a certificate of probable cause, as required by Penal Code section 1237.5 and California Rules of Court, rule 8.304. Subsequently this court granted defendant leave to file an amended notice of appeal that included a request for a certificate of probable cause. That certificate was granted, and defendant followed with his reply brief.⁴

Discussion

The parties' positions have shifted over the course of the appeal. In his opening brief defendant asserted the unconstitutionality of the four gang-related probation

³ According to the probation officer, in his pre-sentencing interview he denied having any allegiance to the Norteño gang. The probation officer noted several indicia of gang affiliation, however: According to jail records, defendant had admitted being a Northside Castroville Norteño in 1998; in 2002 the jail documented a XIV tattoo on his back, thus identifying him as a Norteño gang member; in 2016 he told deputies that he had been a Norteño his entire life; and when placed in custody for the current offense, he again admitted being a Norteño and was wearing a red shirt and black and red shoes. Finally, while in custody after his arrest, defendant accepted a visit from a known Norteño gang member.

⁴ The People declined to file a supplemental brief after issuance of the certificate.

conditions. He contended that these conditions are inconsistent with *People v. Lent* (1975) 15 Cal.3d 481, that they are unconstitutionally overbroad, and that two of the conditions are void for vagueness. In addition to seeking dismissal for lack of a certificate of probable cause, the People responded that defendant was estopped from challenging the plea because he expressly waived the right to appeal. The People also sought to refute the argument that defendant's appeal waiver was involuntary and unintelligent.

After obtaining a certificate of probable cause, however, defendant filed his reply brief in which he insisted that he "is not challenging the scope of his appellate waiver, nor the validity of his plea." He concedes that he "knowingly and voluntarily accepted a grant of felony probation with the appellate waiver." Instead, he explains, "he is merely arguing that the challenged probation conditions do not fall within the scope of said waiver." With that clarification, we address the cognizability of defendant's challenge to the gang-related probation conditions.

Waiver of Appeal Rights

Defendant signed the plea agreement on April 25, 2017, indicating that he was pleading guilty or no contest to count 1. In the agreement defendant acknowledged the following: "I will receive felony probation with up to one year in jail as a condition of probation. If I later violate probation, the Court can sentence me up to the maximum" of three years in county jail.

Under "Specified Waivers," defendant initialed the following statement: "I hereby waive and give up all rights regarding state and federal writs and appeals. This includes, but is not limited to, the right to appeal my conviction, the judgment, and any other orders previously issued by this court. I agree not to file any collateral attacks on my conviction or sentence at any time in the future. I further agree not to ask the Court to withdraw my plea for any reason after it is entered." As noted, defendant contends that the four gang conditions imposed "do not fall within the scope" of this waiver.

“[A] defendant [may] waive the right to appeal as part of [a negotiated plea] agreement.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*)). Where such a waiver “is nonspecific, e.g., ‘I waive my appeal rights’ or ‘I waive my right to appeal any ruling in this case,’ ” it is considered a general waiver of the right to appeal. (*Id.* at p. 85, fn. 11.) Such a general waiver “will not be construed to bar the appeal of sentencing errors occurring subsequent to the plea” and involving “sentencing issues that were left *unresolved* by the particular plea agreement[] involved.” (*Id.* at p. 85.) However, an appellate waiver will be construed to bar the appeal of sentencing errors where “the plea agreement . . . specif[ied] the sentence to be imposed” and “the waiver of appellate rights . . . specifically extended to any right to appeal such sentence.” (*Id.* at pp. 85-86.)

In *Panizzon*, the California Supreme Court addressed the scope of a sentencing-specific appellate waiver and its effect on a defendant’s right to appeal. The defendant pleaded no contest pursuant to a plea bargain that provided for a sentence of life with the possibility of parole, plus 12 years. (*Panizzon, supra*, 13 Cal.4th at p. 73.) In the written waiver and plea agreement, the defendant agreed that he was waiving his “right to appeal from the sentence [he would] receive in this case.” (*Id.* at p. 82.) The defendant later challenged the sentence on the ground that it was disproportionate to the sentences his codefendants had received after him, and that therefore his sentence constituted cruel and unusual punishment. (*Id.* at pp. 74, 85.) The defendant also argued that the sentencing error was unforeseen or unknown at the time of his plea and appellate waiver, and that such future sentencing error was beyond the scope of his waiver. (*Id.* at p. 85.)

The *Panizzon* Court determined that defendant’s claim fell within the scope of the appellate waiver and was not reviewable on appeal. (*Panizzon, supra*, 13 Cal.4th at p. 89.) The court explained, “Not only did the plea agreement in this case specify the sentence to be imposed, but by its very terms the waiver of appellate rights also specifically extended to any right to appeal such sentence. Thus, what defendant seeks here is appellate review of an integral element of the negotiated plea agreement, as

opposed to a matter left open or unaddressed by the deal.” (*Id.* at pp. 85-86.) The court further stated that “both the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of defendant’s contemplation and knowledge when the waiver was made.” (*Id.* at p. 86.) The court contrasted the case before it to cases in which the defendants had made a general waiver of the right to appeal as part of a negotiated plea agreement and were not barred from appealing subsequent sentencing errors where the sentencing issue had been left unresolved by the particular plea agreements involved.

Defendant attempts to distinguish *Panizzon*, noting that unlike that case, here the plea agreement was silent as to sentencing terms other than the maximum sentence, with no reference to any gang-related restrictions. However, defendant’s waiver of “all rights regarding state and federal writs and appeals,” “including, but . . . not limited to, the right to appeal . . . the judgment” is comprehensive, and in our view, it encompasses defendant’s right to appeal the imposition of the gang conditions in the order of probation. In *People v. Becerra* (2019) 32 Cal.App.5th 178 this court determined that a claim of error in calculating the defendant’s custody credits was within the scope of a waiver of appeal rights that was identical to the one at issue here.

We thus conclude that the broad appellate waiver to which defendant agreed as part of his plea agreement bars review of the gang-related conditions he now contests. Through the express language in the waiver and plea agreement, the parties clearly contemplated that defendant would be placed on probation with conditions, and they clearly contemplated a waiver of the right to appeal from the “judgment.” A “judgment” includes a probation order for purposes of a defendant’s right to take an appeal. (Pen. Code, § 1237, subd. (a); accord, *People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

Disposition

The appeal is dismissed.

ELIA, ACTING P. J.

WE CONCUR:

MIHARA, J.

GROVER, J.